



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Office of General Counsel
P.O. Box 21109
Juneau, Alaska 99802-1109

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MEMORANDUM FOR: Doug Mecum
Acting Regional Administrator, Alaska Region

Sue Salvesson
Assistant Regional Administrator for Sustainable Fisheries,
Alaska Region

THROUGH: Lisa L. Lindeman *Lisa Lindeman*
Alaska Regional Counsel

FROM: *Lauren Smoker*
Lauren Smoker
Attorney, NOAA General Counsel

SUBJECT: Section 305(i)(1)(B) of the Magnuson-Stevens Act and its
applicability to Amendment 85

This memorandum responds to your request for a legal opinion concerning specific language in section 305(i)(1)(B) of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) and the section's applicability to Amendment 85 to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (FMP).

STATEMENT OF ISSUES

- (1) What is the meaning of the phrase "directed fishing allocation" in section 305(i)(1)(B)(ii)(I) of the Magnuson-Stevens Act?
- (2) What is the meaning of the word "establishment" in section 305(i)(1)(B)(ii)(I)?
- (3) Does section 305(i)(1)(B)(ii)(I) require that Amendment 85 include a directed fishing allocation of 10 percent of Pacific cod to the CDQ program?

SHORT ANSWERS

- (1) Although undefined, the meaning of the phrase "directed fishing allocation" in section 305(i)(1)(B)(ii)(I) is plain given the statutory language of section 305(i)(1)(B) and the Magnuson-Stevens Act. "Directed fishing allocation" means an amount of fish allocated to the Western Alaska Community Development Quota (CDQ) Program that is for directed fishing and that does not include amounts needed for incidental catch or



bycatch. Amounts needed for incidental catch and bycatch would be in addition to the statutorily prescribed directed fishing allocation.

(2) Although undefined, only one reasonable interpretation of the word “establishment” is available given the statutory language of the Magnuson-Stevens Act. The plain meaning of the word “establishment” is the date on which fishing commences under an approved quota program, fishing cooperative, sector allocation or other rationalization program. If Amendment 85 is approved by NMFS, the changes mandated by section 305(i)(1)(B)(ii)(I) will take effect on the date fishing commences under the Amendment 85 BSAI Pacific cod allocations.

(3) Because Amendment 85 is a sector allocation program, it must include measures that are consistent with section 305(i)(1)(B)(ii)(I) when the North Pacific Fishery Management Council (Council) submits it to the Secretary for review in accordance with sections 304(a) and (b) of the Magnuson-Stevens Act. A statement within the legislative history that indicates different effective dates for section 305(i)(1)(B)(ii)(I) in regards to Pacific cod does not override the statutory language.

BACKGROUND

A. Amendment 85

In April 2006, the Council adopted Amendment 85 to the FMP. Among other things, Amendment 85 would allocate specific percentages of BSAI Pacific cod among various non-CDQ sectors currently operating in the fishery as follows:

Jig Catcher Vessels (CVs)	1.4%	Pot Catcher Processors (CPs)	1.5%
<60' Hook-and-line/Pot CVs	2.0%	Hook-and-line CPs	48.7%
≥60' Hook-and-line CVs	0.2%		
≥60' Pot CVs	8.4%	AFA Trawl CPs	2.3%
Trawl CVs	22.1%	Non-AFA Trawl CPs	13.4%

When the Council adopted Amendment 85, the CDQ Program was receiving 7.5 percent of the annual BSAI Pacific cod TAC. The CDQ Program's allocation of BSAI Pacific cod included both directed fishing and nontarget needs and was subtracted from the TAC before the TAC was further subdivided. The Council has not yet submitted Amendment 85 for Secretarial review, but is expected to submit it before the end of 2006.

B. The Coast Guard and Maritime Transportation Act of 2006

The Coast Guard and Maritime Transportation Act of 2006 (Coast Guard Act) was enacted on July 11, 2006. Pub. L. No. 109-241, 120 Stat. 516. Section 416 of the Coast

Guard Act amends section 305(i)(1) of the Magnuson-Stevens Act,¹ establishing a number of new provisions for the CDQ Program.

Section 305(i)(1)(B) governs allocations to the CDQ Program. Section 305(i)(1)(B)(i) states:

IN GENERAL.- Except as provided in clause (ii), the annual percentage of the total allowable catch . . . allocated to the program in each directed fishery of the Bering Sea and Aleutian Islands shall be the percentage approved by the Secretary, or established by Federal law, as of March 1, 2006, for the program. The percentage for each fishery shall be either a directed fishing allowance or include both directed fishing and nontarget needs based on existing practice with respect to the program as of March 1, 2006, for each fishery.

Given this language, the current Pacific cod allocation to the CDQ Program of 7.5 percent of the BSAI Pacific cod TAC would continue. The allocation includes both directed fishing and nontarget needs as that was the management practice with regards to Pacific cod as of March 1, 2006. However, section 305(i)(1)(B)(ii)(I) describes an exception to the general rule. It states:

Notwithstanding clause (i) – (I) the allocation under the program for each directed fishery of the Bering Sea and Aleutian Islands (other than a fishery for halibut, sablefish, pollock, and crab) shall be a directed fishing allocation of 10 percent upon the establishment of a quota program, fishing cooperative, sector allocation, or other rationalization program in any sector of the fishery.

Congress did not define the phrase “directed fishing allocation” or the word “establishment” in either the Coast Guard Act or the Magnuson-Stevens Act.

ANALYSIS

A. Meaning of the Phrase “Directed Fishing Allocation” As Used In Section 305(i)(1)(B)(ii)(I)

The CDQ Program currently receives 7.5 percent of the BSAI Pacific cod TAC, and the allocation includes both directed fishing and nontarget needs. As a result, 7.5 percent of the Pacific cod TAC is the total maximum amount that may be caught by participants in the CDQ Program while fishing in any CDQ fishery.²

¹Prior to the Coast Guard Act, section 305(i)(1) of the Magnuson-Stevens Act included several provisions for the CDQ Program that were added by the Sustainable Fisheries Act in 1996 (Pub. L. No. 104-297, 110 Stat. 3559).

²A CDQ group is prohibited from catching Pacific cod in amounts that exceed the group’s allocation of Pacific cod. 50 C.F.R. §679.7(d)(5). Any CDQ group that catches Pacific cod in excess of their allocation is in violation of the regulations and could be subject to enforcement action.

Section 305(i)(1)(B)(ii)(I) increases the percentage allocated to the CDQ Program to 10 percent if a quota program, fishing cooperative, sector allocation, or other rationalization program is established in any sector of the fishery. However, a question arises as to whether the increased allocation includes both directed fishing and nontarget needs (thus capping the new allocation to the CDQ Program at 10 percent) or whether the increased allocation includes only directed fishing needs (thereby creating a new allocation to the CDQ Program that is actually greater than 10 percent because incidental catch and bycatch of CDQ program participants are not counted against the 10 percent allocation). Congress described the new allocation in section 305(i)(1)(B)(ii)(I) as a “directed fishing allocation” but did not define the phrase. In order to accurately allocate an appropriate amount of a BSAI directed fishery, such as Pacific cod, to the CDQ Program under section 305(i)(1)(B)(ii)(I), an interpretation of the phrase “directed fishing allocation” is necessary.

Given the statutory language of section 305(i)(1)(B), the plain meaning of the phrase “directed fishing allocation” is an amount of fish allocated to the CDQ Program that is for directed fishing and does not include incidental catch and bycatch.³ Amounts necessary for incidental catch and bycatch would be in addition to the statutorily prescribed directed fishing allocation. In section 305(i)(1)(B)(i), Congress specified that the CDQ allocation would be either a directed fishing allowance or include directed fishing and nontarget needs. Congress therefore understood and clearly distinguished between CDQ allocations that are solely for directed fishing and CDQ allocations that include both directed fishing *and* nontarget (incidental catch and bycatch) needs. In section 305(i)(1)(B)(ii)(I), however, Congress used the phrase “directed fishing” to describe the allocation to the CDQ Program. Use of the phrase “directed fishing” indicates that the allocation is solely for directed fishing and does not include incidental catch or bycatch amounts.

The language in 305(i)(1)(B)(ii)(I) also specifies two changes to the general CDQ Program allocations set forth in section 305(i)(1)(B)(i) when a quota program, fishing cooperative, sector allocation, or other rationalization program is established. Congress increased the percentage allocated to the CDQ Program when such a program is established,⁴ and specified a directed fishing allocation. The CDQ pollock fishery, which is exempt from section 305(i)(1)(B)(ii)(I), is the only CDQ directed fishery that is a

³Rules of statutory interpretation provide that the meaning of a statute is plain when the language is clear and unambiguous on its face (*i.e.*, not contradicted by other language in the same act), admits of no more than one meaning, and is not unreasonable or illogical in its operation. Sutherland Stat. Construction §45:02; 46:01 (6th Ed.). Ambiguity exists “when a statute is capable of being understood by reasonably well-informed persons in two or more different senses. Sutherland Stat. Construction §45:02 (6th Ed.). Words or phrases not defined by the statute do not necessarily mean that the word or phrase is ambiguous and subject to agency interpretation; rather, undefined words and phrases are to be interpreted as taking their ordinary, contemporary, common meaning unless the ordinary meaning fails to fit within the statutory text as a whole. *See AFL-CIO v. Glickman*, 215 F.3d 7, 10 (D.C. Cir. 2000) (lack of statutory definition does not render a term ambiguous, but, instead, it simply leads a court to give the term its ordinary, common meaning.)

⁴With the exception of the CDQ halibut, fixed-gear sablefish, pollock, and crab fisheries, which are specifically excluded from section 305(i)(1)(B)(ii)(I), the CDQ Program currently receives 7.5 percent of the annual TACs for all groundfish fisheries allocated to the CDQ Program.

directed fishing allowance. If Congress had intended to continue the existing allocation method that includes both directed fishing and nontarget catch for the remainder of the CDQ directed fisheries, it could have used language that only increased the allocation percentage. Instead, Congress specifically identified a directed fishing allocation in addition to the increased allocation.⁵

Although the meaning of the phrase is plain from the statutory language, additional support for such an interpretation can be found in the legislative history for section 305(i)(1)(B)(ii). 152 CONG. REC. S6,042 (daily ed. June 19, 2006) (statements of Sen. Murray and Sen. Stevens). In an exchange between Senators Murray and Stevens, Senator Murray stated her interpretation of section 305(i)(1)(B)(ii) and its reference to a 10 percent directed fishing allocation “as a directed fishing allowance which does not include incidental catch.” *Id.* After explaining that CDQ allocations are currently managed as hard caps, which include both directed and incidental catch of the CDQ groups, Senator Murray asked Senator Stevens if he intended “to change the current manner in which the council sets CDQ allocations in these fisheries, from a hard cap allocation to a directed fishing allocation.” *Id.* Senator Stevens replied that he did. *Id.* This further supports an interpretation that CDQ allocations under this paragraph would not include non-target needs.

B. Meaning of the Word “Establishment” As Used In Section 305(i)(1)(B)(ii)(I)

A question has been raised regarding when the CDQ allocations under section 305(i)(1)(B)(ii)(I) will be effective. Therefore, an interpretation of the word “establishment” as used in that section is necessary. In the Magnuson-Stevens Act rulemaking process, there are two distinct dates on which a quota program, fishing cooperative, sector allocation, or other rationalization program could be “established:” (1) the earliest date on which a rule can be effective under the APA, which is generally 30 days after publication of the final rule,⁶ or (2) the date on which fishing commences under the approved program.⁷ NMFS publishes final rules for these types of programs at various times during the fishing year. However, fishing typically commences under these types of programs at the beginning of a fishing year following issuance of a final rule

⁵An examination into whether some interpretive insight can be gained through Congress’ use of “directed fishing allocation” versus “directed fishing allowance” does not bear fruit. In section 305(i)(1)(B)(i), Congress recognized two types of percentages for the CDQ Program; either the percentage is a directed fishing allowance that excludes nontarget needs or it includes both directed fishing and nontarget needs. Although “directed fishing allocation” is not identical to “directed fishing allowance,” the difference does not support a conclusion that Congress intended a directed fishing allocation to include both directed fishing and nontarget needs. Congress did not describe percentages that include both directed fishing and nontarget needs as directed fishing allocations. Therefore, the appropriate focus should be on the words “directed fishing,” which are the words Congress used to describe the allocation.

⁶A final rule may be effective earlier than 30 days after publication of the final rule if the agency has good cause to shorten or waive the APA’s 30-day cooling off period. 5 U.S.C. 553(d).

⁷Under quota programs, fishing cooperatives, and other rationalization programs, there can be interim dates, such as application deadlines, that fall after publication of the final rule but prior to the commencement of fishing under such programs. While these dates have importance to the overall implementation of the program, none of them permit participants to begin fishing under such programs.

mainly to avoid the disruption that would likely occur to existing sectors and allocations with a mid-year effective date. If “establishment” means the earliest possible date by which a rule can be effective, *i.e.*, no later than 30 days after publication of the final rule in the *Federal Register*, then regulatory adjustments for the CDQ Program likely would be effective during a mid-point in the fishing year and therefore adjustments of allocations to other sectors would be required to accommodate the increase to the CDQ Program. If “establishment” means the date on which fishing commences under one of these programs, then regulatory adjustments for the CDQ Program in Amendment 85 would be effective at the same time the Amendment 85 non-CDQ sector allocations are effective.

The word “establishment” is not defined in the Magnuson-Stevens Act or in the Coast Guard Act. In such cases, the rules of statutory construction provide that the ordinary, common meaning of the word should be applied.⁸ The common definition of the word “establishment” is “to bring into existence, create, make, start, originate, found or build.”⁹ This definition lends support to using the fishing commencement date, as that is the date on which the program exists or starts. While publication of a final rule is the first step in starting or bringing into existence such programs, the program itself does not go into effect until the beginning of the next fishing year, even if that is more than 30 days after issuance of the final rule.

Also, Congress used the word “establishment” as opposed to “effective date” or “promulgate.” The Magnuson-Stevens Act currently uses the word “promulgate” in reference to issuance of final regulations or rules.¹⁰ “Promulgate” is not defined in the Magnuson-Stevens Act, but has been interpreted by NMFS to mean publication of regulations in the *Federal Register*, consistent with the word’s common meaning (“to make known by open declaration; to make public as having the force of law; to announce officially”).¹¹ Because Congress was well aware of the word “promulgate” and its meaning, and used a different word in section 305(i)(1)(B)(ii)(I), it is consistent with the rules of statutory construction to conclude that Congress intended “establishment” to have a meaning different from “promulgate” and the date of publication of regulations in the *Federal Register*.¹²

Finally, the statutory language creates a tie between the CDQ Program receiving the benefits from an increased directed fishing allocation and the non-CDQ sector(s) receiving the benefits from one of the specified programs. For the reasons provided above, fishing typically commences under one of the specified programs at the start of a fishing year. To interpret “establishment” as meaning the earliest possible effective date would de-link the CDQ and non-CDQ sectors because they would not receive benefits simultaneously.

⁸Sutherland Stat. Construction § 47:28 (6th Ed.).

⁹Webster’s 3rd New International Dictionary.

¹⁰See sections 304(b)(3), 305(c), 305(d), and 305(f) of the Magnuson-Stevens Act.

¹¹Webster’s 3rd New International Dictionary.

¹²Sutherland Stat. Construction §46:06 (6th Ed.).

Based on the foregoing, only one reasonable interpretation of the word “establishment” is available given the statutory language of the Magnuson-Stevens Act. The meaning of the word “establishment” is the date on which fishing commences under an approved quota program, fishing cooperative, sector allocation or other rationalization program. Therefore, the changes to the CDQ Program allocation contemplated in section 305(i)(1)(B)(ii)(I) would take effect when fishing under one of these types of programs commences.

C. Inclusion of provisions consistent with section 305(i)(1)(B)(ii)(I) in Amendment 85

Sections 304(a) and (b) of the Magnuson-Stevens Act require that FMPs, FMP amendments, and regulations be consistent with the provisions of the Magnuson-Stevens Act and other applicable law. Section 305(i)(1)(B)(ii)(I) became effective on July 11, 2006, the date of enactment of the Coast Guard Act. Therefore, any FMP, FMP amendment, or regulation submitted to the Secretary that is a quota program, fishing cooperative, sector allocation, or other rationalization program now must include provisions for a directed fishing allocation of 10 percent to the CDQ Program to be consistent with the Magnuson-Stevens Act, as amended by the Coast Guard Act. Because Amendment 85 would allocate specific percentages of BSAI Pacific cod among a number of fishing sectors, Amendment 85 is a sector allocation program. As such, it must include measures that are consistent with the changes mandated by section 305(i)(1)(B)(ii)(I) when it is submitted to the Secretary for review in accordance with section 304(a).

Although the statutory language is clear, a statement is included in the legislative history for the Coast Guard Act that says, with respect to Pacific cod, “the new CDQ allocations under section 416 are not intended to take effect until full rationalization of that fishery, or January 1, 2009, whichever date is earlier.” 152 CONG. REC. S6,042 (daily ed. June 19, 2006) (statement of Sen. Stevens). The rules of statutory construction provide that if the statutory language is clear and unambiguous, the language of the statute controls.¹³ Additionally, the Supreme Court has recognized that:

statutory language might not be conclusive if there is a ‘clearly expressed legislative intention to the contrary,’ to which the Court usually adds two propositions: this would be a ‘rare and exceptional’ circumstance; and Congress expresses itself in the language of the statute.

Southeast Shipyard Ass’n v. U.S., 979 F.2d 1541, 1545 (D.C. Cir. 1992) (Emphasis added).

The floor statement made by Senator Stevens quoted above appears to express his intention for Pacific cod, contrary to the statutory language of section 305(i)(1)(B)(ii)(I). Even so, the statutory language (1) makes no reference to the two triggers identified in the statement, (2) can be rationally implemented as currently worded, and (3) is not

¹³Sutherland Stat. Construction §45:02 (6th Ed.).

inconsistent with other provisions of the Magnuson-Stevens Act. To give meaning to the statement, many additional words would have to be added to the statutory language, contrary to the tenets of statutory construction.¹⁴ Congress clearly expressed itself in the language of the statute, and therefore the statutory language is controlling.

CONCLUSION

For the reasons explained above, “directed fishing allocation” means an amount of fish allocated to the CDQ program that is for directed fishing and does not include incidental catch or bycatch; such amounts would be in addition to the 10 percent directed fishing allocation. “Establishment” as used in section 305(i)(1)(B)(ii)(I) means the date on which fishing commences under an approved quota program, fishing cooperative, sector allocation or other rationalization program. Finally, Amendment 85 is a sector allocation program and as such it must include measures that are consistent with section 305(i)(1)(B)(ii)(I) when it is submitted to the Secretary for review in accordance with sections 304(a) and (b). If Amendment 85 is approved by NMFS, the CDQ Program will receive a 10 percent directed fishing allocation of Pacific cod, amounts of Pacific cod necessary for incidental catch and bycatch will be in addition to the 10 percent directed fishing allocation, and the directed fishing allocation of Pacific cod to the CDQ Program will not take effect until the date on which fishing under the Amendment 85 BSAI Pacific cod allocations commences.

cc: GCAK, GCF

¹⁴Sutherland Stat. Construction §47:38 (6th Ed.).